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Atari Interactive, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

ATARI INTERACTIVE, INC.,

Plaintiff,

vs.

REDBUBBLE, INC.,

Defendant.

AND RELATED ACTIONS

Case No. 4:18-cv-03451-JST  
*[Related to Case No. 4:19-cv-00111-JST]*

**PLAINTIFF ATARI INTERACTIVE, INC.'S  
OBJECTIONS TO REDBUBBLE, INC.'S  
BILL OF COSTS**

Judge: Hon. Jon S. Tigar  
Date: March 3, 2022  
Time: 2:00 p.m.  
Crtrm.: 6, 2nd Floor

1 Plaintiff Atari Interactive, Inc. (“Atari”) objects to Redbubble, Inc.’s (“Redbubble”) Bill of  
 2 Costs, ECF No. 266, as follows.

3 **I. THE COURT SHOULD DEFER ANY COSTS AWARD PENDING THE**  
 4 **RESOLUTION OF ATARI’S APPEAL.**

5 Similarly to a motion for attorneys’ fees, courts have discretion to stay consideration of a  
 6 bill of costs pending resolution of an appeal on the merits. *G.P.P., Inc. v. Guardian Prot. Prods.,*  
 7 *Inc.*, No. 1:15-cv-00321-SKO, 2018 WL 932087, at \*2–3 (E.D. Cal. Feb. 16, 2018) (collecting  
 8 cases). For the same reasons set forth in Atari’s concurrently-filed Opposition to Redbubble’s  
 9 Motion for Attorneys’ Fees, Atari respectfully requests that the Court delay ruling on Redbubble’s  
 10 Bill of Costs until such time as Atari’s pending appeal has been resolved.

11 **II. REDBUBBLE’S REQUESTED COSTS FOR VISUAL AIDS ARE NOT**  
 12 **COMPENSABLE, AND ARE UNSUBSTANTIATED AND FACIALLY**  
 13 **UNREASONABLE.**

14 Redbubble bears the burden “to demonstrate the amount of costs that are taxable under  
 15 relevant local laws.” *Pac. Coast Bldg. Prods., Inc. v. CertainTeed Gypsum, Inc.*, No. 18-CV-  
 16 00346, 2019 WL 8137133, at \*2 (N.D. Cal. Dec. 5, 2019) (citing *In re Ricoh Co., Ltd. Patent*  
 17 *Litig.*, 661 F.3d 1361, 1367 (Fed. Cir. 2011) (“The burden is on the prevailing party to establish  
 18 the amount of compensable costs and expenses to which they are entitled.”)). In regard to visual  
 19 aids, Redbubble must demonstrate “[t]he cost of preparing charts, diagrams, videotapes, and other  
 20 visual aids to be used as exhibits” was “reasonably necessary to assist the jury or the Court in  
 21 understanding the issues at the trial.” L.R. 54-3(d)(5). Redbubble failed to so demonstrate.

22 **A. Time spent to “discuss graphics” or “develop graphics” at the direction of**  
 23 **Redbubble lawyers.**

24 Redbubble presents invoices with numerous time entries to “discuss graphics” or “develop  
 25 graphics” at the direction of Redbubble’s lawyers. These time entries provide insufficient details  
 26 to demonstrate that any of the time was compensable, are facially unreasonable, and include non-  
 27 compensable intellectual efforts.

1                   **1.       Redbubble fails to show the visual aids were reasonably necessary, and**  
2                   **the time billed to their preparation is facially unreasonable.**

3           Redbubble’s time entries provide insufficient detail for Atari or the Court to determine  
4 whether any of the time was billed in connection with developing graphics that were reasonably  
5 necessary, each following this format:

6       18.25   Hours 10/31/21 12:00 a.m.-4:15 a.m.; 10:00 a.m.-12:00 a.m.       295.00   5,383.75  
7               [ON-SITE ARTIST] Mr. Kent Bell developed graphics per the  
8               direction of Ms. Daralyn Durie, Mr. Joseph Gratz, Ms. Allyson  
9               Bennett, Ms. Moon Hee Lee, and Mr. Matthaeus Martino-  
10              Weinhardt.

11 Dkt. No. 266-2, 12. Notably missing is any indication as to *which graphics* were developed and  
12 for *what purpose*. Without that information it is impossible to determine whether the graphics  
13 were to be used as exhibits, or whether the graphics were reasonably necessary. *See Pac. Coast*  
14 *Bldg. Prods.*, 2019 WL 8137133, at \*3 (disallowing costs where evidence was not provided  
15 sufficient to determine whether costs were taxable).

16           Atari’s gripes with Redbubble’s documentation are not merely technical in nature—the  
17 amount of costs submitted by Redbubble when compared to the length of trial and amount of  
18 demonstratives used suggests serious duplication and overbilling. The following chart provides  
19 week-by-week summaries of the time submitted by Redbubble to “prepare graphics” or “discuss  
20 graphics”.

Date	Hours	Rate	Total
9/26/2021–10/2/2021	1	\$295.00	\$295.00
10/3/2021–10/9/2021	55.5	\$295.00	\$16,372.50
10/10/2021–10/16/2021	34	\$295.00	\$10,030.00
10/17/2021–10/23/2021	122	\$295.00	\$35,900.00
10/24/2021–10/30/2021	162.75	\$295.00	\$48,011.25
10/31/2021–11/06/2021	150.75	\$295.00	\$44,471.25
Total	526	\$295.00	\$155,170.00

21           Notably, Redbubble did not use any original demonstrative graphics during Atari’s case-  
22 in-chief or its own defense. While the invoices do not so specify, during Atari’s required meet-  
23 ings, Redbubble’s attorneys did not introduce any demonstrative graphics.

1 and-confer with Redbubble, Redbubble’s counsel confirmed that these time entries related to the  
 2 creation of the PowerPoint slides presented alongside Redbubble’s opening and closing  
 3 arguments. Even if accepted, it is facially unreasonable to spend in excess of 500 hours preparing  
 4 two PowerPoints, and even if Redbubble’s counsel made the strategic choice to do so, this was not  
 5 a “reasonably necessary” expense that may be passed along to Atari as costs.

6 **2. The block billing includes non-compensable meeting and planning time.**

7 Redbubble’s time entries failed to provide sufficient detail to separate compensable time  
 8 spent preparing graphics from non-compensable time, such as the intellectual effort used to  
 9 consider graphics and meeting time. *See Linex Techs., Inc. v. Hewlett-Packard Co.*, No. 13-cv-  
 10 00159-CW, 2014 WL 5494906, at \*9 (N.D. Cal. Oct. 30, 2014) (“[C]osts associated with the  
 11 intellectual effort involved in creating the content of demonstratives are not recoverable.”)  
 12 (quoting *Ancora Techs., Inc. v. Apple, Inc.*, No. 11-CV-06357, 2013 WL 4532927, at \*5 (N.D.  
 13 Cal. Aug. 26, 2013)); *Zuill v. Shanahan*, 80 F.3d 1366, 1371 (9th Cir. 1996) (same); *Emblaze Ltd.*  
 14 *v. Apple Inc.*, No. 5:11-cv-01079, 2015 WL 1304779, at \*7 (N.D. Cal. Mar. 20, 2015)  
 15 (disallowing costs for “time spent meeting with individuals about demonstratives”).

16 The time entries suggest that meetings and discussions occurred between Redbubble’s  
 17 counsel and graphics technicians, because the graphics were prepared “per the direction” of  
 18 Redbubble’s counsel, and as a matter of common sense, Redbubble’s graphics technicians could  
 19 not have developed PowerPoints to track Redbubble’s opening and closing arguments without  
 20 consulting Redbubble’s counsel. However, the time entries provide no breakdown as to what  
 21 percentage of the time was devoted to such non-compensable meetings and discussion, and the  
 22 entire time entries must thus be disallowed. *Blade Room Group, LLC v. Emerson Elec. Co.*, No.  
 23 5:15-cv-01370-EJD, 2019 WL 13036321, at \*11 (N.D. Cal. Dec. 11, 2019) (“[T]o the extent that  
 24 any of this non-taxable work may have been block-billed in the same entry as arguably taxable  
 25 costs, those entries should be disallowed in their entirety because there is no evidentiary basis for  
 26 apportioning the costs between taxable and non-taxable time”).

27 **B. Time spent for onsite technology support.**

28 Redbubble provided invoices for tech support, with the majority of the time entries stating

that Brian Lee provided “Services:Technology:Onsite Support”. The following chart provides week-by-week summaries of the time submitted by Redbubble fitting this general description.

Date	Hours	Rate	Total
10/10/2021–10/16/2021	5.25	\$245.00	\$1,286.25
10/17/2021–10/23/2021	39.75	\$245.00	\$9,738.75
10/24/2021–10/30/2021	82.75	\$245.00	\$20,273.75
10/31/2021–11/06/2021	52	\$245.00	\$12,740.00
Total	179.75	\$245.00	\$44,038.75

Primarily, technical support at trial is not part of “preparing charts, diagrams, videotapes, and other visual aids to be used as exhibits,” and the time should thus be disallowed in its entirety. *Vectren Commc’ns Servs. v. City of Alameda*, No. C 08–3137 SI, 2014 WL 3612754, at \*6 (N.D. Cal. July 22, 2014) (“[M]any of charges for physical preparation of demonstratives are listed under the same headings as charges for assisting counsel in the courtroom with presenting the exhibits. Alameda has not cited any authority holding that charges for assisting counsel in this way are recoverable.”).

Nonetheless, even courts that have allowed costs for trial technicians in the context of complex patent litigation, where the courts have found such technical assistance to be required, have limited the time to those hours spent in court while trial was in session. *Emblaze*, 2015 WL 1304779, at \*7 (“In this trial, where the jury commenced deliberations on day eight, the court can only reasonably assume that services for eight days from 9:00AM to 4:30PM fall within the statutory requirement.”). Here, trial was only in session for a total of roughly 28.5 hours, including jury selection and a day where the parties were dismissed early because the jury did not appear,<sup>1</sup> and thus, at maximum, 28.5 hours of Mr. Lee’s time could be compensable. Venezia Decl. at ¶¶ 2, 3.<sup>2</sup>

<sup>1</sup> 10-25-2021: roughly 6 hours of jury selection; 10-26-2021: zero time; 10-27-2021: 4.5 hours; 10-28-2021: 4.5 hours; 11-01-2021: 4.5 hours; 11-02-2021: 4.5 hours; 11-03-2021: 4.5 hours.

<sup>2</sup> Mr. Lee’s additional charges for equipment, meals, and air fare, in a total amount of \$1,136.17, do not relate to the preparation of demonstratives, and should also be disallowed.

1 **III. CONCLUSION**

2 For the reasons set forth above, Atari requests that the Court defer ruling on Redbubble's  
3 Bill of Costs pending the resolution of Atari's appeal, or alternatively, should the Court rule at this  
4 time, strike Redbubble's requested costs related to visual aids.

5 Dated: January 18, 2022

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9 

10 By: \_\_\_\_\_

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